Before the

Federal Communications Commission

Washington, DC 20554

In the Matter of	)	
	)	
Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems	)	CC Docket No. 94-102
	)	
King County, Washington Request Concerning E911 Phase I Issues	)	

To: Chief, Wireless Telecommunications Bureau

JOINT REPLY COMMENTS

Pursuant to Section 1.429(g) of the Commission's rules, 47 C.F.R. § 1.429(g), and the Bureau's Public Notice, Verizon Wireless, VoiceStream Wireless Corporation, and Qwest Wireless ("Petitioners") hereby reply to comments opposing the Petition for Reconsideration of the May 7, 2001 Wireless Telecommunications Bureau ("Bureau").[1] Petitioners primarily address the opposition filings submitted by NENA, APCO and NASNA (jointly as the "PSAP Entities") and the Texas 911 Agencies. These parties opposing the Petition have not adequately addressed the procedural infirmities of the Bureau Letter. In addition, they fail to present a basis in the record or the rules for the Bureau's rationale and, indeed, offer arguments flatly inconsistent with the Bureau's own reasoning. For the reasons discussed herein and in the Petition, the Bureau must hold that the appropriate "demarcation point" is the MSC.

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[1] 47 C.F.R. § 1.429(g); Public Notice, CC Docket No. 94-102, DA 01-1520 (rel. June 27, 2001), 66 Fed. Reg. 35977 (July 10, 2001); Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Marlys R. Davis, E911 Program Manager, King County E-911 Program Office, dated May 7, 2001 ("Bureau Letter"). Original petitioner Nextel Communications, Inc. ("Nextel"), has concurrently filed separate reply comments to respond to comments specifically addressing Nextel's advocacy in the proceeding, but remains in full accord with the Petition.

I. THE BUREAU MUST MEANINGFULLY EXPLAIN WHY IT REJECTED CARRIERS' ARGUMENTS

The PSAP Entities argue that "the Commission need not address, explicitly and by attribution, each point made by every commenter" and that the Bureau Letter "plausibly explained the decision."[2] This mischaracterizes the Petition, which explains that it is only "significant" and "relevant" comments to which an agency must respond.[3] While Petitioners and the PSAP Entities alike agree that the Bureau's rationale must "enable [a] court to evaluate the agency's rationale at the time of decision,"[4] having adopted King County's and other public safety associations' position, the Bureau must explain its reasons for rejecting carriers' contrary arguments in order to meet this standard. Carriers opposing the King County Letter presented significant arguments and factual information in response to specific issues the Bureau itself raised in the original Public Notice.[5] Having raised these issues, the Bureau was obliged to respond to the comments addressing these issues and must therefore reconsider its decision.[6]

It is not enough that "the contentions of both sides are fairly summarized" in a single paragraph;[7] a mere recitation of arguments raised does not indicate whether an agency "carefully considered proposed alternatives."[8] Rather, an agency must address the merits of such

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2 PSAP Entities at 1-2. The Texas 911 Agencies similarly argue that the Bureau "summarized" the "division of opinion" and "has no obligation to take the approach advocated by the largest number of commenters." Texas 911 Agencies at 5.

3 *See* Petition at 4, n.10.

4 *See* PSAP Entities at 2 n.2 (citing *PBGC v. LTV Corp.*, 110 S.Ct. 2668, 2680 (1990)).

5 *See* Public Notice, CC Docket No. 94-102, DA 00-1875 (rel. Aug. 16, 2000) at 2.

6 *See Central and South West Services, Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (agency's "request for comments on [proposed requirement] and the numerous comments . . . received on this request required [agency] to give reasons for declining to promulgate" such requirement); *Radio-TV News Dirs. Ass'n v. FCC*, 184 F.3d 872, 884 (D.C. Cir. 1999) (Commission failed to address issue raised in *Notice of Proposed Rulemaking*).

7 *See* PSAP Entities at 1; Texas 911 Agencies at 5.

8 *See American Civil Liberties Union, v. FCC*, 823 F.2d 1554, 1564 (D.C. Cir. 1987)

arguments, not simply acknowledge them – it must "consider reasonably obvious alternative . . . rules, and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review."[9] Moreover, while the Texas 911 Agencies argue that the decision was "supported by the record," the Bureau does not cite to *any* of the record evidence as a basis for its decision. Assuming that the Bureau had reasons for rejecting carriers' arguments, basic principles of administrative law require it to explain those reasons.[10]

II. THE BUREAU EXCEEDED ITS LIMITED DELEGATION OF AUTHORITY

The PSAP Entities argue that "[t]he Commission is entitled, if it chooses, to define a core 'E911 Wireline Network' to which all carriers connect their respective subscribers." The Commission, however, is not "entitled" to define anything in this regard, absent a notice and comment rulemaking proceeding.[11] Moreover, the PSAP Entities only implicitly acknowledge that the King County Letter was a *Bureau*, not *Commission* decision.[12] Even so, the full Commission can cure the infirmities of the Bureau's decision only by pursuing further a notice and comment rulemaking and issuing an order based on the record.

The Texas 911 Agencies hope to cure the procedural infirmities of the Bureau Letter by citing to the authority delegated to the Bureau in the *Second MO&O* to resolve disputes over "a

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9 *See* Petition at 4 n.10; *Telocator Network of America v. FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982).

10 *See Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997) (Commission "fail[ed] to respond to contrary arguments resting on solid data"); *Achernar Broadcasting Company v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995) ("If the Commission examined [one party's] standards and found them acceptable in light of other valid [policy] goals . . . , it should articulate its findings and the underlying rationale"); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 48 (1983) (an "alternative way of achieving the [stated] objectives . . . should have been addressed and adequate reasons given for its abandonment"); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 763-64 (6th Cir. 1995) (same).

11 *See* Petition at 3, 8-15.

12 *See id.* at 1 (recommending the Bureau refer the matter to the full Commission).

particular issue on selecting the transmission technology" such as CAS or NCAS.[13] There is no such dispute at issue, however, and this is an invalid basis for the Bureau's sweeping decision. Moreover, because the Bureau does not rely on this delegated authority as a basis for its decision, the Texas 911 Agencies' argument must be summarily rejected.[14]

III. THE BUREAU'S OWN REASONING COMPELS A DEMARCATION POINT AT THE MSC

The PSAP Entities and the Texas 911 Agencies attempt to justify the Bureau's reasoning for defining the "E911 Wireline Network" to which carriers must deliver Phase I information. In doing so, however, each uses different and inconsistent interpretations of the Bureau's decision and, in both cases, their arguments are undermined by the terms of the Bureau Letter itself.

The PSAP Entities assert that "[t]he fact that [LECs and wireless carriers] connect their end offices or mobile switches to the Selective Router by means of wire lines does not logically require that those trunk lines be part of the core E911 Wireline Network" and that the Bureau has instead permissibly "treat[ed] the connections as part of a larger 'E911 network.'"[15] This is simply *not*, however, what the Bureau has done. The Bureau expressly defined the "existing E911 Wireline Network" as that "which is maintained by the ILEC and paid for by PSAPs through tariffs" and then described what the Bureau deemed are its specific components. Even though the record in the proceeding is replete with record evidence that trunks between the MSC and selective router have traditionally (and in Washington state) been "maintained by the ILEC and paid for by the PSAPs through tariffs" – a fact which the PSAP Entities and Texas 911 Agencies do not dispute -- the Bureau nevertheless determined without explanation that such

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13 *See* Texas 911 Agencies at 7-8 (citing *Second Memorandum Opinion and Order,* 14 FCC Rcd. 20850, ¶¶ 7, 92 (1999) ("*Second MO&O*").

14 Bureau Letter at 1 n.2.

15 PSAP Entities at 3.

trunks are excluded.[16] Thus, there is no "larger 'E911 network'" at issue under the Bureau's interpretation, but a specific E911 Wireline Network to which wireless carriers must deliver Phase I information. The Bureau's own definition of the E911 Wireline Network compels a "delivery point" at the MSC – not the selective router.

The Texas 911 Agencies, in contrast, acknowledge that the E911 Wireline Network includes MSC-Selective Router trunks, but argue that this fact "does not serve to impose costs on any particular party when wireless 9-1-1 calls are at issue."[17] This argument, however, is flatly inconsistent with the Bureau's reasoning, which renders the definition of the E911 Wireline Network essential to determining cost allocation. The Bureau interpreted the rules to require carriers to "bring the wireless call, as well as the information about the caller . . . *to the E911 Wireline Network*" which, again, is the facilities "maintained by the ILEC and paid for by PSAPs through tariffs."[18] Given the Commission's understanding (as affirmed by the Texas 911 Agencies) that the E911 Wireline Network includes MSC-Selective Router trunks, the Bureau must designate the MSC as the appropriate demarcation point to "resolve[this issue] under outstanding Commission precedents and guidelines."[19]

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16 *See* Petition at 6 n.24. The PSAP Entities acknowledge the Bureau's discriminatory treatment of wireless carriers vis-à-vis LECs, dismissing the favorable treatment of ILECs as a "historical artifact." PSAP Entities at 7.

17 Texas 911 Agencies at 7 (stating that "the Bureau acknowledges that the 'existing' E911 Wireline Network includes trunking to the 9-1-1 Selective Router").

18 *See* Bureau Letter at 4 (emphasis added).

19 *See* 47 C.F.R. § 0.331(a)(2). For this reason also, the Texas 911 Agencies' implication that resolution of carriers' and PSAPs' different rule interpretations is somehow separable from the Bureau's "implementation query" is misplaced. *See* Texas 911 Agencies at 6.

IV. OPPONENTS' RULE INTERPRETATION IS WITHOUT BASIS IN THE COMMISSION'S RULES, ORDERS, OR THE BUREAU LETTER

The PSAP Entities wrongly argue that the Bureau has merely interpreted Section 20.18(j) of the Commission's rules. A review of the Bureau Letter reveals only an interpretation of the Phase I requirements of Section 20.18(d)(1) – a fact which the Texas 911 Agencies acknowledge.[20] The Bureau cited to no basis in the rules, orders, or the record, for determining that MSC-Selective Router trunks are not the "Public Safety Answering Point's costs" under Section 20.18(j).[21] This, however, was the very issue raised in the King County Letter.

The PSAP Entities also claim that holding PSAPs responsible for such facilities would essentially nullify the *Second MO&O*. The notion that such an outcome is the "logical conclusion" of the Petition is itself devoid of logic.[22] The *Second MO&O* simply determined that for purposes of the rules, carriers would be responsible for carriers' costs, while PSAPs would be responsible for PSAPs' costs. Carriers' Phase I costs are nontrivial and, as the Commission is aware, costs for Phase II service are even more substantial.[23] Carriers did "expect[] to be reimbursed" for such trunking expenses prior to the *Second MO&O*, precisely because carriers themselves considered such costs to be the PSAP's.[24]

The Texas 911 Agencies again argue that the Commission's delegation of dispute resolution authority in the *Second MO&O* provides a basis for the Bureau's action. As noted

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20 Bureau Letter at 3-4; *see* Texas 911 Agencies at 4, 14. The Bureau acknowledges the existence of the rule, but avoids any interpretation of Section 20.18(j). *See* Petition at 11.

21 *See* Petition at 11.

22 *See* PSAP Entities at 4.

23 *See* Qwest Wireless Comments of September 18, 2000, at 13; Sprint PCS Comments of September 18, 2000, at 8 n.12; VoiceStream Reply Comments of October 11, 2000 at 5-6.

24 *See* PSAP Entities at 4.

supra, this argument flatly contravenes the Bureau Letter itself.[25] Moreover, the Bureau did not purport to interpret the "delegation of authority" language of the *Second MO&O*, as the Texas 911 Agencies imply.[26] Rather, it is the Bureau's interpretation of Section 20.18 of the rules that is as issue. In this regard, given the Texas 911 Agencies' admission that Commission precedent puts MSC-Selective Router trunking facilities in the E911 Wireline Network, their conclusion that "the Bureau Letter is consistent with the record in this docket" is inexplicable.

The Texas 911 Agencies attempt to extract a separate basis for the Bureau Letter from the *Second MO&O*, but their arguments are without merit. The Commission acknowledged King County's position, but did not rely on this part of the *Second MO&O*, as the Texas 911 Agencies erroneously assert.[27] Also, to read the *Second MO&O* as evidence that carriers "conceded . . . that they bore the costs of interconnection to the [ILEC]"[28] or "effectively set the Selective Router as the demarcation point" is flatly wrong. The cited provisions from the *Second MO&O*, by their terms, address "the upgrade of the LEC-based E911 networks" which "carriers should not have to fund."[29] Again, the Texas 911 Agencies' admission that the E911 Wireline Network includes MSC-Selective Router trunks underscores the weakness of these arguments.

V. CARRIER COST RECOVERY ISSUES

A. Wireless Carriers' Ability to Recoup Their Own E-911 Costs Is Irrelevant to a Determination of Which Costs Are Appropriately the PSAPs'

Petitioners demonstrated that the Bureau's arguments with respect to carrier cost recovery are immaterial to King County's request. Parties opposing the Petition, however,

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25 *See supra* note 14.

26 *See* Texas 911 Agencies at 8-9 (stating the Commission was "fully aware that disputes would arise" and "[n]o ambiguity is at issue" as to the Bureau's dispute resolution authority).

27 The Texas 911 Agencies cite paragraph 87, but the Bureau cites to paragraphs 92 and 94.

28 Texas 911 Agencies at 12 (citing *Second MO&O* ¶ 96).

simply repeat their mantra that wireless carriers' rates are unregulated, and the PSAP Entities argue further that the *Second MO&O* made relevant King County's inquiry regarding appropriate cost allocation. [30] Petitioners have never disputed that the *Second MO&O* made the issue of the cost allocation more acute for carriers and PSAPs and, more relevant to the instant debate, do not dispute that *carriers' costs* resulting from E-911 implementation can be recouped through their rates. Petitioners' point is simply that the issue of how a carrier may recover its costs is irrelevant to how PSAPs' and carriers' costs are defined in the first instance.[31]

The PSAP Entities also dismiss cost causation principles as "more suited to a tariff environment not imposed on wireless services."[32] "Cost causation" in this case, however, goes to the functionality of MSC-Selective Router trunks – *i.e.*, the question of "for whose benefit are the facilities provisioned?" The record in this proceeding demonstrates, and opposing parties do not dispute, that such facilities are deployed solely for the benefit E-911 Wireline Network to the PSAP's specifications. Indeed, the Bureau's admonition that a carrier not "unilaterally select a technology that could not be used by the PSAPs in that jurisdiction or that could not be used to meet its upcoming Phase II obligations" all but acknowledges this fact.[33] As Petitioners stated,

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29 *Second MO&O* ¶ 98.

30 PSAP Entities at 5.

31 Petition at 9-10. The Texas 911 agencies' citation to the court's discussion of wireline parity is therefore inapposite. Texas 911 Agencies at 15 (citing *US Cellular*, Slip Op. at *25).

32 PSAP Entities at 5; *see also* Texas 911 Agencies at 10-11.

33 *See* Bureau Letter at 6. As a related matter, the Bureau *has* effectively chosen which party may choose the Phase I transmission method and technology, contrary to the PSAP Entities' and Texas 911 Agencies' arguments. *See* PSAP Entities at 6, Texas 911 Agencies at 13. The impact of the Bureau's admonition is clear – if the PSAP does not want to incur the costs of upgrading its network to handle 20 digits of information or believes that NCAS will serve as a better springboard to Phase II, as a practical matter the carrier will have little choice but to deploy and incur the costs of NCAS. As the Texas 911 Agencies stated, carriers' technology choice must be "*consistent with the PSAP's existing E911 network . . . .*" Texas 911 Agencies at 13 (emphasis added). In other words, if the PSAP does not want to upgrade its
(continued on next page)

"E911 is, fundamentally, a service provided to government agencies which, in turn, provide emergency services for their taxpayers, and facilities in the E911 Wireline Network are provisioned for a public purpose – not a commercial one."[34] This holds true regardless of whether a tariffed wireline carrier or a nontariffed wireless carrier is involved.

B. *US Cellular v. FCC* Addressed Carrier Cost Recovery – Not PSAP Costs or Responsibilities

The PSAP Entities and the Texas 911 Agencies cite to the court's finding that "PSAPs are not the cost causers for wireless E911 implementation" as a basis for the Bureau's decision.[35] The court, however, solely addressed *carriers' costs* and simply determined that carriers may recover their own costs through their rates for service. As to PSAP-LEC provisioning arrangements for network facilities, the Commission itself stated to the court that:

> CMRS carriers, moreover, do not provide services or facilities directly to PSAPs, *who remain customers of the wireline carriers*. . . . [and]
>
> It is entirely rational for subscribers to wireless services to pay through their charges for the costs the Commission has required the carriers to incur to upgrade *their systems* to include E911 services. . . . The PSAPs will not make these [911] calls, but will always be in the position of receiving them through interconnection of the wireless carriers with the wireline networks – *to which the PSAPs subscribe*.[36]

The Commission did not argue – and the court did *not* in any way hold -- that carriers are now responsible for the services or facilities provisioned by the LEC for the PSAP.

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network, the carrier will need to deploy NCAS. Indeed, the Texas CSEC has since proposed changing its regulations to eliminate HCAS and alternative Feature Group D deployment options from its Phase I cost recovery rules. 26 Tex. Reg. 5169, 5172 (July 13, 2001).

[34] Petition at 10 n.36; *see also US Cellular v. FCC*, No. 00-1072, Slip Op. at 15 (D.C. Cir. June 29, 2001) ("PSAPs are governmental entities playing a critical role in the provision of public safety services"). The PSAP Entities' assertion that Petitioners "admit . .. that the issue [of cost causation] is a policy choice on which the agency has broad latitude" is mistaken.

[35] PSAP Entities at 5 n.10; Texas 911 Agencies at 11.

CONCLUSION

For the foregoing reasons and those discussed in the Petition, the E911 Wireline Network includes MSC-selective router trunking facilities, and the Bureau must reconsider its decision that the appropriate demarcation point for allocating carriers' and PSAPs' E911 Phase I costs is the selective router.

Respectfully submitted,

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[36] Federal Communications Commission, Brief for Respondents, No. 00-1072 (D.C. Cir. filed Feb. 7, 2001) at 35 (emphasis added).